Petition

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No.

Supreme Court of the United States

October Term, 1981

NICHOLAS L. WARINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

Convicted of one count of conspiracy and two counts of possession of stolen goods moving in interstate commerce from an indictment that charged 10 separate counts, petitioner submits that the following questions are raised:

(1) Whether the trial Judge erred in not permitting the defense Counsel a voir dire examination of a key identification witness, whose identification was the product of a one to one confrontation otherwise known as a show up some 3 months after the surveillance was conducted.

(2) Whether the trial Judge erred in permitting over objection of defense Counsel the admission of testimony concerning the petitioner's proclivity to commit crime, when that testimony was neither established to be close in time to the charged offenses nor was the burden of proof of similar acts met.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Nicholas L. Warino, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra*, pp. A1-A2) is an unreported opinion of the Sixth Circuit.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, pp. A1-A2) was entered on June 30, 1981. The jurisdiction of this Honorable Court is invoked pursuant to 28 USC § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *; nor shall any person * * * be compelled in any criminal case to be a witness against himself, nor be deprived life, liberty, or property, without due process of law * * *.

The pertinent section of the Federal Rules of Evidence as promulgated by this Honorable Court provides:

Rule 404 (B)

> Evidence of other crimes, wrongs or acts is not admissable to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissable for other purposes, such as proof of notice, opportunity, intent preparation, plan, knowledge, identity or the absence of mistake or accident.

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of the Northern District of Ohio on March 13, 1979, for interstate shipment of stolen goods and motor vehicles and conspiracy to commit said offenses in violation of Title 18 United States Code Sections 2312, 2314, 2315, and Sections 2 and 371. The alleged violations involve the shipment of stolen goods in interstate commerce in the Northern District of Ohio during the months of June, July, August and September, 1977.

Petitioner was arraigned on or about March 30, 1979, before the Honorable Leroy J. Contie and entered a plea of not guilty. Also arraigned on or about March 30, 1979, were co-defendants Cleveland Fann, Joseph White, Sam Allen Nichols, Jr. and Howard L. Smith. All defendants entered pleas of not guilty. The matter was then set for trial to commence on April 23, 1979. Joseph White later pleaded guilty to one count of conspiracy and was sentenced to five years incarceration.

On April 23, 1979, the trial court conducted hearings on various motions to suppress certain wire tap evidence and granted a severance of all defendants from petitioner. After denial of petitioner's motion for suppression of wire tap evidence, a jury trial commenced on April 25, 1979, and concluded on May 7, 1979. Petitioner was found not guilty on six counts of the indictment and guilty of two counts of possession of stolen goods moving in interstate commerce and one count of conspiracy. Petitioner was permitted to remain on bond pending a pre-sentence investigation and upon completion of said investigation, was sentenced to custody of the Attorney General for a period of six years.

On July 6, 1979, trial counsel filed Notice of Appeal to the Court of Appeals. On June 30, 1981, the Court of Appeals affirmed the conviction of the Petitioner and Petitioner on July 20, 1981 moved the Court of Appeals for a stay of the mandate in order that Petitioner could file this petition seeking a Writ of Certiorari from this Honorable Court.

STATEMENT OF FACTS

The government's evidence included the testimony of a convicted felon, co-defendant Howard Smith, who participated in the theft of washers and ovens in Mansfield, Ohio on June 25, 1977. Smith testified that he and Fann and Nichols stole two tractor trailers from a depot in Mansfield and transported them to Youngstown, Ohio. They contacted defendant Joseph White to determine whether or not White would assist in the sale of the stolen items. After the contents of the trailers were unloaded in Youngstown, they were abandoned in Pennsylvania. Smith, Nichols and Fann returned to Cleveland to await the distribution of the stolen goods and a division of the proceeds. Smith indicated that the stolen articles were unloaded at Cabinet Design warehouse owned by Paul Joseph, who was deceased at the time of trial. He also indicated that the unloading occurred on the morning of June 26, 1977. Smith testified that a person named Nick was present in the warehouse and was taking down numbers and counting the quantity of items removed from the trucks and identified petitioner as that person.

Smith, Fann and Nichols made several trips to Youngstown during July and August, 1977, and Smith testified that in early September, 1977, they removed their share of the remaining washers and ovens because of dissatisfac-

tion with the Youngstown group. The washers removed by Smith, Nichols and Fann were to be disposed of in Cleveland and Smith indicated that there was, thereafter, no further contact of a business nature between him, Fann and Nichols and anyone in Youngstown.

During the initial testimony of Smith, the government had attempted to elicit from him statements of a hearsay nature claiming them to be admissible under the statement of co-conspirators to the hearsay rule. The Court excluded such testimony for the reason that the government had not as yet shown the existence of a conspiracy and the petitioner's participation in it by a preponderance of the evidence.

The government's testimony continued with Charles B. Harvey, who in the summer of 1977 was a local law enforcement officer attached to a "Task Force". Mr. Harvey admitted that at the time of trial he was on probation to a federal court for violation of statutes dealing with the distribution of narcotics. Harvey's involvement in the instant case began with conversations had with Joseph White, who did not testify, concerning the shipment of stolen goods and White's ability to release and sell those goods to people that Harvey would have contacted. Pursuant to those discussions, Harvey indicated that wire taps were placed upon the business and residence telephones of White for the period of August 25, 1977, through September 25, 1977. Harvey further testified that through White certain controlled purchases of washers and ovens were arranged for. These purchases were accomplished on July 5th and 6th, 1977.

Like Smith, Harvey was not permitted to introduce hearsay evidence of conversations with co-defendants because of a continuing failure to show the existence of a conspiracy.

Special Agent Lawrence Lynch of the FBI testified that on July 6, 1977, he was part of a surveillance team at Cabinet Design. As part of that surveillance team, he observed a "white male, black hair and large nose and dark complected" driving a bronze Cadillac automobile. Later, during the same period of surveillance he saw that same person whom he identified as the defendant at trial (but whom he could not identify at the time of the surveillance) exit from Cabinet Design with a "dolly or wheel truck" and put it into the trunk of the bronze Cadillac and leave the area.

On September 20, 1977, agent Lynch was shown a single photograph in which there appeared several persons, one of whom was petitioner, and from that picture identified petitioner as the same person he had seen in his July 6th, 1977, surveillance. Prior to the testimony of Lynch, trial counsel for petitioner had requested a voir dire examination for the purpose of determining the circumstances under which Lynch had made the photograph identification of petitioner on September 20, 1977. The request was denied.

At the conclusion of agent Lynch's direct examination, the trial court found that the government had established the existence of a conspiracy and the petitioner's participation in that conspiracy by a preponderance of the evidence and thereafter permitted hearsay statements of coconspirators.

Included in that hearsay testimony was the statement by Special Agent Terrance J. Sheehan of the FBI that Joseph White in a conversation with him referred to prior criminal activity in which he and petitioner had engaged. This testimony was admitted into evidence over the objection of counsel for petitioner and on the following day the

Court apparently attempted to instruct the jury to disregard that testimony.

Through Sheehan and other surveilling agents there was testimony admitted with respect to an aborted attempt to purchase washers and ovens by Sheehan in March, 1978.

The government's case also included video tapes of Cabinet Design made during the controlled purchases. Petitioner appears on none of the video tapes.

The government also presented testimony concerning the wire tap surveillance on the telephones of Joseph White and tapes of certain of those conversations.

Petitioner testified in his own behalf and denied any participation in or knowledge of the activities charged in the indictment. Specifically, he denied being at Cabinet Design on June 26, 1977, and said that he was at his cottage on Lake Milton in Niles, Ohio, for his birthday, which is June 25, not later than 8:30 A.M. on that date. His presence there was corroborated by two other witnesses.

Paul Joseph, III, son of the deceased Paul Joseph who owned Cabinet Design, testified that at the request of his father he was present on June 26, 1977, at which time heavy boxes were unloaded from two trailers into Cabinet Design. He denied that petitioner was among those present at that time.

On direct examination, petitioner testified concerning one of the taped telephone conversations between himself and Josph White and on cross-examination, over objection of counsel, was questioned concerning other taped telephone conversations.

REASONS FOR GRANTNG THE WRIT

I.

The Court of Appeals assessment in a few passing sentences that petitioner was not denied a fair trial by the denial of defense counsel's voir dire request hinges on the erroneous conclusion that the evidence of guilt was overwhelming and ignores the statements of this Honorable Court in *Watkins v. Souders,* Nos. 79-5949 & 79-5951 decided January 13, 1981 wherein the Supreme Court while denying the *per se* requirement of jury voir dire in identification questions did indicate that:

> "A judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable. In some circumstances not presented here, such a determination may be constitutionally necessary."

In *Watkins v. Souders, supra* this Honorable Court granted Certiorari to specifically determine whether or not in state trial courts there was a constitutional requirement to grant a judicial inquiry out of the presence of the jury in identification procedures. This Honorable Court very rightly concluded that where, as in both cases before the Court there appeared an overwhelming guarantee of lack of suggestiveness in the identification procedure no voir dire examination was *per se* required.

This Honorable Court however did set forth as many lower appellate courts had in the past, that the more prudent method is that such voir dire is indeed permitted in all cases.

The Court of Appeals in finding no denial of a fair trial below patently ignored distinct departures from the *Wat-*

kins v. Souders, supra rationale. In the instant case, the petitioner was surveilled by the identifying witness on or about July 5, 1977. It was not until September 20, 1977 that the identifying witness identified petitioner in a procedure that until today goes unknown. The only factors about that identification process that are known are that it was conducted some three months after the observation and was secured by use of a single photograph. That is to say no photo-spread or line-up was used.

In *Watkins v. Souders, supra,* this Court constrained by the facts of state criminal proceedings, specifically elected to limit its decision to the following circumstances which were evident in both cases. The identification procedures used in those cases were ones which had the benefit of trustworthiness on their face. Each case had the availability of closeness in time between the observation and the indentification. But more importantly, each identification was the product of a line-up or a photo-spread, where none of the inherent suggestiveness attendant to a one on one show-up is present. *Summons v. United States,* 390 U.S. 377 (1968); *United States v. Wade,* 388 U.S. 218 (1967); *Gilbert v. California,* 388 U.S. 263 (1967).

Even with these benchmarks of trustworthiness present in the *Watkin's* case *supra,* this Honorable Court went further and elected to notice the lower courts with these admonishing words:

> . . . The prudence of such a hearing (voir dire) has been emphasized by many decisions in the Court of Appeals, most of which have in various ways admonished the trial Courts to use that procedure. . .
>
> . . . In some circumstances not presented here, such a determination (voir dire) may be constitutionally necessary.

II.

This Honorable Court should also consider that in granting this petitioner's request for Certiorari that this Court will then be presented with a situation not before the Tribunal in *Watkins v. Souders, supra,* which is the availability in a federal criminal proceeding of the exercise of supervisory powers over the lower federal courts.

Many Courts of Appeals have as noted in *Watkins v. Souders, supra,* elected to admonish the trial courts that the more prudent method of determination is one which is outside the presence of the jury. Indeed, in the Third and Ninth Circuits the Courts of Appeals have openly exercised their supervisory powers in reversing convictions based upon denials of voir dire examination on identification in trial courts.

In the Third Circuit, the Court of Appeals in *United States ex rel. Fisher v. Dressler,* 546 F.2d 18 (3rd Cir. 1976) found the lack of such a procedure as voir dire of identification testimony as a possible deprivation of due process and exercised its supervisory power in reversing a conviction based on a trial without benefit of such a voir dire.

In the Ninth Circuit, the Court of Appeals when confronted with similar facts as early as 1969, in *United States v. Allison,* 414 F.2d 407 (9th Cir. 1969) similarly admonished its trial courts to adopt the more prudent procedure of permitting voir dire examination of the out of court identification procedures in all instances but especially so, where there existed an appearance of suggestiveness.

III.

The Court of Appeals in affirming the trial court's admission of hearsay testimony concerning the petitioner's

proclivity to commit crime represents not only a departure from the Sixth Circuit's own mandates as to limited use of such evidence, but also presents a direct conflict with other Courts of Appeals in the interpretation of the correct application of Rule 404B of the Federal Rules of Evidence which reads in pertinent part:

> Rule 404(B):
>
> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of notice, opportunity, intent preparation, plan, knowledge, identity or the absence of mistake or accident.

The trial court over objection of Counsel, permitted a testifying undercover agent to relate to the jury a conversation with another defendant (not on trial) and the agent, in which the declarant stated he had previously dealt in stolen property with the petitioner. The Court of Appeals without lengthy discussion found such admission to be within Rule 404B as evidence of motive. This was permitted without benefit of the limiting instruction as to proper consideration of such evidence by the jury when "other crimes" is properly admitted as well as with a total disregard for the cases which require that such evidence be proven by "clear and convincing" evidence, and that there appear a proximity in time of the charged offense and the "other crimes."

The Sixth Circuit Court of Appeals failed to recognize its own authority by refusing to apply the clear precedents that the tribunal set down in *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975) and its progeny:

> The mere recitation by the prosecution that evidence of the accused's bad acts is offered under an exception is not sufficient for its admission.

The Court of Appeals continued in its departure from its own Body of Law by refusing to adhere to the threshold prerequisites annunciated in *United States v. Largent*, 545 F.2d 1029 (6th Cir. 1976), as follows:

> This evidence (other crimes) must be substantially similar and near in time to the offense charged, must be in issue, and must have more probative value than prejudicial impact.

The *Largent* court, *supra*, also cited with approval the basic maxims of admissibility of "other crimes" evidence as promulgated in *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977) *cert. denied* ..... U.S. ..... (1977), as follows:

(1) Proof of the other similar crimes must be plain, clear and convincing.

(2) The other crimes must not be too remote in time from the charged offense.

(3) The evidence of the other crime must be introduced for a purpose sanctioned by Rule 404B of the Federal Rules of Evidence.

(4) The element of the charged offense that the other evidence of other crimes is introduced to prove, must be a material issue in the case.

(5) There must be a substantial need for the probative value of the evidence of the other crimes.

More recently the Circuit Courts of the District of Columbia and the First Circuit, have enunciated in re-

versals the application of the standards set out above as the proper method.

In *United States v. Pisari*, 636 F.2d 855 (1st Cir. 1981) the Court of Appeals clearly reversed lower court convictions which were based on the introduction of similar acts which did not comply with the levels of admissibility set forth in Rule 404(B) of the Federal Rules of Evidence.

The governing rationale in the First Circuit's decision centered upon the strict mandates of other courts in the usage of such devastating evidence which severely impairs the defendant's credibility.

The instant decision of the Sixth Circuit represents the exact opposite treatment of the same rule by condoning the use of flimsy rumor in establishing the highly prejudicial evidence of other criminal activity. The incident related in *United States v. Pisari* at least was a verified uncharged crime, in the instant case, nothing can be said about the similar act other than the fact that it was based on double hearsay.

Similarly, the District of Columbia Circuit Court of Appeals in *United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980) reversed convictions of the District Court where similar act testimony did not comply with the Burden of Proof requirements that such evidence be demonstrated by clear and convincing evidence.

The District of Columbia Circuit Court's ruling sets forth even stricter compliance standards than did the First Circuit in *United States v. Pisari, supra.* These rulings would seem to dictate that strict adherence to the proper usage of similar acts evidence is the only way that such volitive evidence should be admitted. Even the slightest departure from those safeguards must be viewed as the

District of Columbia Circuit Court did as fatal to admissibility.

A comparison of these two recent circuit court decisions with the Sixth Circuit's affirmation of a bald face rumor as meeting these standards can only demonstrate the need for direction from the highest Tribunal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 30, 1981)

No. 79-5204

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICHOLAS WARINO,
Defendant-Appellant.

ORDER

Before EDWARDS and WEICK, *Circuit Judges* and PHILLIPS, *Senior Circuit Judge.*

Appellant Warino has appealed to this court from a judgment of conviction and sentence entered upon a guilty verdict by a jury for receiving stolen property that was moving in interstate commerce, in violation of 18 U.S.C. § 2315, selling that stolen property in violation of 18 U.S.C. § 2315, and conspiracy to commit those substantive offenses in violation of 18 U.S.C. § 371. He was sentenced to concurrent terms of five years imprisonment on the conspiracy count and six years imprisonment on each of the substantive counts. He was found not guilty by the jury on six other counts of the indictment.

On appeal, Warino contends (1) that the district court erred in admitting his in-court identification by an F. B. I. agent where a prior out-of-court identification might have been made under impermissibly suggestive circumstances; (2) in admitting testimony of prior criminal activity which he claims was inadmissible; (3) in admitting the testimony of a co-conspirator; and (4) in permitting appellant to be cross-examined on matters outside the scope of direct examination.

We find no merit to any of these contentions. There was overwhelming evidence of Warino's guilt. We find that no prejudicial error occurred at the trial. The evidence of prior criminal activity was admissible as showing motive. Rule 404(b) Fed. R. Evid. 103(a)(1). The court sustained an objection to part of it which, in our judgment, should have been admitted. We do not believe appellant was prejudiced by the court's ruling on evidentiary matters.

The judgment of conviction is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NICHOLAS L. WARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to conduct a hearing outside the presence of the jury before permitting an FBI agent, who had previously identified petitioner, to give identification testimony.

2. Whether the admission of testimony concerning prior criminal activity warranted a new trial where the testimony was stricken and the jury was admonished to disregard it.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1981, and the petition for a writ of certiorari was filed on August 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of receiving stolen

property that was moving in interstate commerce (18 U.S.C. 2315), one count of selling that stolen property (18 U.S.C. 2315), and one count of conspiracy to commit the substantive offenses (18 U.S.C. 371). Petitioner was sentenced to concurrent terms of five years' imprisonment on the conspiracy count and six years' imprisonment on each of the substantive counts. The court of appeals affirmed.

The trial evidence showed that, in the early morning hours of Sunday, June 26, 1977, Howard Smith and two other persons stole two tractor-trailers containing 153 Tappan ovens, each of which was valued at $495, and 90 White-Westinghouse washing-machines, worth $299 each, from a freight company in Mansfield, Ohio. Thereafter, Joseph White arranged to store the merchandise in Youngstown, Ohio, in a cabinet shop owned by Paul Joseph; White also telephoned petitioner, a local night club owner, to inform him of the theft. At 6:00 that morning, these six men met at the cabinet shop and unloaded the appliances. They agreed to share equally in the profits from the sale of the stolen goods. Tr. 66-71, 73-78, 85-88, 110, 113, 133, 159-171.

Most of the stolen appliances were sold during the next few months at prices ranging from $100 to $140. For instance, on July 5, 1977, White sold 30 washing machines to an undercover police officer in Pennsylvania at a price of $137 each (Tr. 247-259). On the following day, White sold the police officer six more washing machines and 36 ovens. On the evening of July 6, FBI Agent Lawrence Lynch conducted a surveillance in Youngstown as White picked up the appliances. Agent Lynch observed petitioner, White, and Joseph at the cabinet shop. As the three men left the shop, petitioner placed a dolly in his

mother's Cadillac. Agent Lynch did not know petitioner's name at the time of this surveillance, but he accurately described petitioner in his surveillance notes. Resp. Br. 12-13; Tr. 321-328, 590-591.

Two months later, another FBI agent showed petitioner's photograph to Agent Lynch. Without hesitation, Agent Lynch identified petitioner as the man he had seen in the Cadillac on July 6. G. Exh. 18; Tr. 368-369, 409-411.

On March 13, 1978, the undercover officer attempted to purchase 40 more ovens. White told the officer that "Nicky" was eager to sell the ovens and move out of the state. As the officer waited for the delivery in Pennsylvania, Agent Lynch again conducted a surveillance in Youngstown. Agent Lynch saw White and petitioner meet and travel a circuitous route through the city, stopping at several bars, restaurants and shopping centers. Petitioner eventually detected the surveillance and refused to consumate the sale. White returned to Pennsylvania empty-handed. Tr. 266-272, 331-343, 608-610, 728-729, 769-774.

As part of the government's case, Howard Smith, one of the three persons who stole the tractor-trailers on June 26, 1977, testified that petitioner was present on that date at the cabinet shop where the tractor-trailers were taken, that petitioner helped unload the stolen appliances from the tractor-trailers, and that petitioner kept an inventory of the merchandise (Tr. 159-171, 308-310). Agent Lynch identified petitioner as the man who met White at the cabinet shop on July 6, 1977, when White picked up 42 appliances to sell to the Pennsylvania undercover officer (Tr. 159-171). Agent Lynch also identified petitioner as the man who met with White on March

13, 1978, the night of the aborted sale (Tr. 335-340).[1] Testifying in his own behalf, petitioner denied that he was present at the shop on either June 26 or July 6, 1977 (Tr. 1142-1163). However, petitioner admitted that White telephoned him on the morning of June 26, and that he met White in Youngstown on March 13, 1978, but stated that the purpose of this meeting was unrelated to the stolen appliances (Tr. 1138-1139, 1204-1212).

ARGUMENT

1. Petitioner contends (Pet. 8-14) that Agent Lynch should not have been permitted to identify him in court in the absence of a hearing outside the presence of the jury to determine the admissibility of the identification. There is no constitutional requirement, however, that a judicial determination be afforded outside the presence of the jury concerning the admissibility of identification evidence in every case. *Watkins* v. *Sowders*, Nos. 79-5949 and 79-5951 (Jan. 13, 1981), slip op. 8. Generally, as here, it is sufficient that the parties be permitted to develop the circumstances surrounding the out-of-court identification on cross-examination. Petitioner was afforded a full and fair opportunity to cross-examine Agent Lynch, and petitioner does not point to a single facet of the identification that he was unable to explore on cross-examination. See *Watkins* v. *Sowders*, *supra*, slip op. 7.

Moreover, the record clearly establishes that the identification testimony was properly admitted, and

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[1] Petitioner's involvement in the scheme was also outlined by Smith's testimony, co-conspirator declarations made by White to undercover officers, and tape recorded telephone conversations between petitioner and White (Tr. 1007-1035).

petitioner therefore suffered no prejudice from the lack of a preliminary examination. Although Agent Lynch identified petitioner from a single photograph, there was absolutely no "likelihood of irreparable misidentification." See *Manson* v. *Brathwaite*, 432 U.S. 98, 116 (1977); *Simmons* v. *United States*, 390 U.S. 377, 389 (1968). Agent Lynch, a trained surveillance officer, conducted surveillance in Youngstown for several daylight hours on July 6, 1977. He observed petitioner on three occasions that evening, and he saw petitioner at close range on one occasion when petitioner's car was positioned beside his. Agent Lynch recorded his observations minute by minute, and petitioner was one of the principal subjects of his surveillance (Tr. 321-329, 412-417). Thus, unlike a frightened victim or a casual bystander who unexpectedly witnesses a crime, Agent Lynch was calm, attentive, and reflective when he viewed petitioner. Like the police officer in *Manson* v. *Brathwaite*, *supra*, Agent Lynch could be expected to pay scrupulous attention to detail because he knew it was likely that subsequently he would have to find and arrest petitioner. See 432 U.S. at 115. Furthermore, law enforcement officers routinely come in contact with photographs of purported criminals. Thus, Agent Lynch was unlikely to be swayed by the single photograph that was shown to him in September. The accuracy of his identification of petitioner's photograph at that time was underscored by both its immediacy and certitude. Significantly, Agent Lynch saw petitioner on two or three occasions after the photo identification, and he therefore had ample opportunity to confirm his conclusion that petitioner was the man he saw on July 6. Indeed, one of those occasions was the evening of ~~March 14, of~~ the aborted sale of March

13, 1978, when Agent Lynch again watched petitioner and White in Youngstown (Tr. 334-340).

Petitioner nevertheless urges the Court to exercise its supervisory powers over the federal courts and establish a per se rule requiring that all in-court identifications be preceded by preliminary voir dire examinations. Although such a hearing may have value in some cases, this case—involving the inherently reliable identification by a trained law enforcement officer of one of the subjects of his surveillance—illustrates that an invariable requirement is unnecessary. In most cases, the preliminary examination would simply duplicate cross-examination. At all events, the facts of this case well demonstrate that it is not an appropriate vehicle for considering whether such an examination should be required in the exercise of this Court's supervisory powers.

2. Petitioner contends (Pet. 10-14) that his conviction should be vacated because testimony was adduced at trial that he and White had handled stolen property on other occasions (Tr. 804-805).[2] Although

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[2] The disputed evidence was introduced in the following context (Tr. 804-805):

> Q. What did [Joe White] say about Nicky Warino?
>
> A. Well, as we were talking awhile, we started discussing going out to eat, and he mentioned that he had this friend, Nick Warino, from Youngstown who on one occasion had come over, and during the course of some business they were conducting, traveling around in the New Castle, Pennsylvania area, and Nicky was a big eater, had eaten four full meals, because he indicated Nicky was not a big man physically, and he indicated that he and Nicky had regularly done business together in handling property.

petitioner objected to this other-crime evidence, petitioner failed to state the ground for his objection, and the court mistakenly, but understandably, believed that petitioner was objecting only to the form of the question. Thus, the court initially sustained the objection and struck the response, but after the question was rephrased, the witness was permitted to answer it (*ibid.*). Having failed to clarify the specific ground for his objection, petitioner has waived his right to raise the matter now. See Fed. R. Evid.

Q. Did he describe with any particularity what he meant by "handling property"?

A. He was talking about stolen property.

MR. POLICY: Objection.

THE COURT: The objection is sustained, and the jury is instructed to disregard it. You only—you can ask him his conversation only.

MR. SOPKO: Certainly, your Honor.

Q. Specifically, just referring to what Mr. White said, did Mr. White mention what property they were talking about?

A. Stolen property.

MR. POLICY: Objection.

THE COURT: The objection is sustained. The answer is stricken. That answer is not responsive.

The question can be answered yes or no.

Q. Did he mention what type of property he was talking about?

A. Yes.

Q. What type of property did he say he was talking about in reference to him and Mr. Warino having business together?

A. Stolen property.

MR. POLICY: Objection.

THE COURT: Overruled. The answer may remain.

103(a)(1). On its own motion, however, the court struck the evidence and gave a curative instruction the next morning (Tr. 823). The court charged the jury to consider only the evidence relating specifically to the stolen appliances that were the subject of the trial (*ibid.*). Petitioner did not object to this instruction or complain that it was inadequate. He never requested a mistrial. Petitioner therefore received all the relief that he requested when the evidence was stricken. Petitioner is entitled to nothing more.

Although this evidence was ultimately stricken, it may well in fact have been properly admissible, as the court of appeals concluded, to prove motive, knowledge or identity. See Fed. R. Evid. 404(b). The evidence was particularly relevant to show identity because petitioner denied that he was the man with White both on June 26, when the stolen appliances were unloaded, and again on July 6, when White picked up part of the shipment to sell to an undercover officer. The evidence further showed that petitioner knew the goods to be stolen. Hence, the court of appeals properly concluded (Pet. App. A-2) that this evidence was admissible under Rule 404(b).[3] Its probative value clearly outweighed its prejudicial impact. *United States* v. *Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); Advisory Committee Notes On Proposed Rules, 28 U.S.C.A., Fed. R. Evid. 404(b).

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[3] Petitioner's contention notwithstanding, the other crimes evidence was not hearsay. It was a statement by White, petitioner's coconspirator, made while White was attempting to sell some of the appliances to an undercover agent. As such, it was made "during the course of and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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